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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 981 57

SCAIFE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

SAMUEL KAUFMAN,
Counsel for Petitioner.

S. LEO RUSLANDER,

JAMES M. MAGEE,

Of Counsel.

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SCAIFE COMPANY,

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COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR REVIEW ON WRIT OF CERTIORARI
OF THE DECISION OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT.**

To the Honorable the Supreme Court of the United States:

Seafe Company, the petitioner (whose name prior to January 1, 1941 was Wm. B. Seafe & Sons Company), respectfully presents this petition for review on writ of certiorari of a decision of the United States Circuit Court of Appeals for the Third Circuit.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 41 B. T. A. 278. The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 572.

Statement of the Matter Involved.

On July 29, 1936, there was filed on behalf of petitioner a Federal capital stock tax return for the year ended June

30, 1936 in which the declared value was by mistake stated in an amount (\$600,000.00) lower than had been determined (\$1,000,000.00) by the officers of petitioner who had charge of the matter. Immediately on discovery of the error on September 3, 1936 a correct return was prepared (declaring the higher amount) and lodged with the Collector accompanied by an explanation of the error and a remittance to cover the additional tax (Opinions below, R. 28 and 36; Exhibit A, R. 26).

The Collector refused to accept the corrected return for filing but transmitted it to the respondent as part of the record and returned to petitioner the amount which had been tendered in payment of the additional tax.

In a proceeding before the Board of Tax Appeals for redetermination of deficiencies in 1936 taxes which the respondent had asserted petitioner contended that its excess profits tax should be computed on the basis of the higher capital stock value declared in the corrected return. The Board of Tax Appeals concluded that petitioner was bound by the lower value stated in the return filed in July, 1936. The Board supported its conclusion with the argument (1) that an amended capital stock tax return filed after expiration of the unextended due date specified in Section 105(d) of the Revenue Act of 1935, 49 Stat. 1017, is not sufficiently timely to fall within the rule of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389, and (2) that the mistakes of its officers do not relieve petitioner of the consequences of its failure to comply with the law (Opinion of the Board, R. 28).

On Review, the Circuit Court of Appeals affirmed the Board (R. 39-40), relying largely on the decision of the Supreme Court in *Riley Investment Co. v. Commissioner*, 311 U. S. 55. The Circuit Court of Appeals omitted any mention of the point urged by the petitioner (and discussed on brief by the respondent) to the effect that an amended re-

turn filed within the period to which the statute permitted an extension was timely within the rule of the *Haggar* case, even though the permitted extension had not been sought or obtained by the petitioner.

On March 24, 1941, the Circuit Court of Appeals for the Second Circuit held, in the case of *Lerner Stores Corporation v. Commissioner*, (not yet officially reported), that a clerical error in the declared value of the capital stock as stated in a timely return may be corrected by filing a late amended return, expressly disagreeing with the decision for review of which this petition is brought in the following statement at the conclusion of its Opinion:

"A case in the Third Circuit, *Wm. B. Scaife & Sons Co. v. Commissioner*, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it."

Jurisdictional Basis.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (Title 28 Code of the Laws of the U. S., Section 347) to review the decision of the United States Circuit Court of Appeals for the Third Circuit entered on January 31, 1941.

The Questions Presented.

1. Whether the term "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 289, 49 Stat. 1017) includes an amended capital stock tax return filed beyond the unextended due date but before expiration of the period for which the Commissioner was empowered by the Statute (Section 105(d)) to grant an extension.

2. In the alternative, whether a declaration of value stated by mistake on a timely "first return" in an amount lower than previously determined by the taxpayer's officers, may be superseded by the correct declaration of value made in a late amended return filed promptly after discovery of the error.

Reasons Relied On for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Third Circuit in the present case is in direct conflict with a decision of the Circuit Court of Appeals for the Second Circuit (*Lerner Stores Corporation v. Commissioner*, decided March 24, 1941 and not yet officially reported), where the Court stated in its Opinion:

“A case in the Third Circuit, *Wm. B. Scaife & Sons Co. v. Commissioner*, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it.”

2. The decisions of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389 and *Riley Co. v. Commissioner*, 311 U. S. 55, have not removed uncertainty on the important questions involved in this case, which should be settled by the Court. The amended return in the *Haggar* case, which was held to be timely, was filed before expiration of the extended due date. The amended return in the *Riley* case, which was held to be untimely, was filed after expiration of the statutory period for which the Commissioner was empowered to grant an extension. Neither case involved a mistake of fact in preparation of the first return, found in the present case and in the *Lerner* case by the Board and the Courts below.

WHEREFORE, it is respectfully submitted that the Supreme Court should grant this petition for review on writ of certiorari of the decision of the Circuit Court of Appeals for the Third Circuit.

SAMUEL KAUFMAN,
Pittsburgh, Pa.,
Counsel for Petitioner.

S. LEO RUSLANDER,
JAMES M. MAGEE, S. K.,
Of Counsel.

APPENDIX.

Revenue Act of 1935, c. 829, 49 Stat. 1017.

Sec. 105. Capital Stock Tax.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *